No. 82-1633

IN THE

Supreme Court of the United States

October Term, 1982

HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF THE FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

CARL WEISSBURG
(Counsel of Record)
J. MARK WAXMAN
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Suite 3200
Los Angeles, Calif. 90067
(213) 277-2223,
Attorneys for Amicus Curiae, Federation of American Hospitals.

Of Counsel:
ROBERT J. ENDERS
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Suite 3200
Los Angeles, Calif. 90067.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented

1. Whether actions voluntarily undertaken, unsupervised by any local, state or federal agency and proven to be violative of Sections 1 and 2 of the Sherman Act, may escape antitrust liability on the grounds that they were "primarily" motivated by an intent to avoid a "needless" duplication of health care resources?

2. Whether this Court should sanction a judicially created "special" rule of reason in "limited derogation" of the normal operation of antitrust rules applicable to health planning activities?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

No. 82-1633

IN THE

Supreme Court of the United States

October Term, 1982

HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Federation of American Hospitals (FAH) respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.[1] The consent of counsel for the Petitioner to the filing of a brief *amicus curiae* by the Federation of American Hospitals has been obtained. The consent of Respondents' counsel was requested, but refused.

[1]FAH previously appeared before this Court as an *amicus curiae* in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981).

FAH is a nonprofit corporation organized and existing under the laws of the State of New York which represents the interests of approximately 1100 investor-owned acute care hospitals located throughout the United States and its possessions by means of direct membership and affiliated state associations. FAH is the recognized spokesman for such hospitals.

FAH and its members have a direct and immediate interest in this case because its members compete in the health care delivery market throughout the country. Moreover, a substantial portion of FAH members are located in states which have enacted health facility planning legislation pursuant to the National Health Planning and Resources Development Act of 1974. FAH members throughout the country, therefore, will ultimately be affected by this Court's decision.

Respectfully submitted,

CARL WEISSBURG
(Counsel of Record)
J. MARK WAXMAN
WEISSBURG AND ARONSON, INC.
Attorneys for Amicus Curiae
Federation of American Hospitals.

Of Counsel:
ROBERT J. ENDERS
WEISSBURG AND ARONSON, INC.

No. 82-1633

IN THE

Supreme Court of the United States

October Term, 1982

HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,

Respondents.

BRIEF AMICUS CURIAE OF THE FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I. INTEREST OF THE FEDERATION OF AMERICAN HOSPITALS

Amicus Curiae Federation of American Hospitals (FAH) respectfully presents this brief in support of the Petitioner's request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled matter.

FAH is a nonprofit corporation organized and existing under the laws of the State of New York which represents the interests of approximately 1100 investor-owned acute care hospitals located throughout the United States and its possessions by means of direct membership and affiliated

state associations. FAH is the recognized spokesman for such hospitals.

FAH and its members have a direct and immediate interest in this case because its members compete in the health care delivery market throughout the country. Moreover, a substantial portion of FAH members are located in states which have enacted health facility legislation pursuant to the National Health Planning and Resources Development Act of 1974. FAH members throughout the country, therefore, will ultimately be affected by this Court's decision.

This brief is submitted to assist the Court in deciding whether to issue a writ of certiorari in this case and to rule on the important issues presented herein.

II. SUMMARY OF THE ARGUMENT

At trial, Petitioner was successful in proving a horizontal market allocation scheme and a concerted refusal to deal, *per se* violations of Section 1 of the Sherman Act, as well as conspiracy and attempt to monopolize claims pursuant to Section 2 of the Sherman Act. The Fourth Circuit reversed the judgment, holding that Respondents were entitled to defend their actions using a "special rule of reason" in "limited derogation of the normal operation of the antitrust laws." The Fourth Circuit's holding was based upon its view that, although the conduct in question was "merely encouraged and authorized" and not mandated by any governmental agency or statute, such conduct was "desirable" and, therefore, could be justified by an "affirmative defense" which would allow it to escape antitrust liability if the challenged activities were undertaken in "good faith" and their "actual and intended effect lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities."

This Court must grant review of the Fourth Circuit's decision. To allow the decision to stand will authorize the federal courts to create "special" rules of reason and new defenses whenever they believe such rules or defenses are "desirable." Such a free rein would, in effect, destroy the objectivity, predictability and litigation efficiency of the *per se* antitrust rules. Moreover, the Fourth Circuit's holding that health care planning activities are to be protected by special antitrust rules conflicts with prior holdings of this Court.

III. ARGUMENT

A. Introduction.

Petitioner is a for-profit corporation operating Mary Elizabeth Hospital ("Hospital") in Raleigh, North Carolina. In 1970 it was acquired by a national investor-owned hospital company which subsequently announced plans to expand Hospital and filed a certificate of need application with the appropriate state authorities to replace Hospital with a new, larger investor-owned facility in Raleigh.

Following the announcement of Petitioner's plans to construct a new hospital, Respondents and other unnamed coconspirators undertook action to oppose construction of the new facility. At the conclusion of a six-week trial, a jury found that Respondents' acts violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and awarded damages based, *inter alia*, on the fact that Respondents' acts caused a 51 month delay in the construction.

The Fourth Circuit reversed the jury's verdict. It held that Respondents should have been able to take advantage of a "special rule of reason" in "limited derogation of the normal operation of the antitrust laws" based upon the "relevant federal health care legislation," which "derogation" was to take the form of an "affirmative defense" to the *per*

se antitrust violations the jury found. 691 F.2d 678, 686 (4th Cir. 1982). This "affirmative defense" will allow Respondents to escape antitrust liability if they are able to prove that their challenged conduct was undertaken (1) in good faith; and (2) its "actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities." 691 F.2d at 686.

In so holding, the Fourth Circuit noted that Respondents' activities were not mandated or required by any statute or regulation, but were "merely encouraged and authorized." In this context, the Fourth Circuit found that the critical question in applying its "special rule of reason" would be whether the "duplication of resources . . . is in fact 'needless' duplication, a question to be determined by the fact finder in relation to the health care needs of the consumer public in the market area at the time in question, objectively assessed and not in relation to the economic or other needs of the 'planners' either objectively or subjectively assessed." *Id.*

A similar analysis was applied to the Petitioner's Section 2 attempt to monopolize and conspiracy to monopolize claims. The Fourth Circuit held that Respondents could defeat such claims by proving their acts were "motivated by the intent to avoid 'needless' duplication rather than specific intent to monopolize." 691 F.2d at 690.

The Fourth Circuit's holdings are a radical departure from precedents established by this Court in other cases addressing the application of *per se* rules generally, and more specifically, the application of *per se* antitrust rules to the health care industry. Moreover, the Court of Appeals' decision was not based upon existing Supreme Court holdings with respect to *per se* rules, but instead is an attempt to create

an exemption to the application of *per se* rules which this Court has already determined is more properly addressed to Congress.

B. There Can Be No "Limited Derogation" of *Per Se* Rules.

This Court has repeatedly held that horizontal market allocation schemes and concerted refusals to deal, or group boycotts, such as those proved by Petitioner herein, are *per se* violations of the antitrust laws. *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958); *Timken Roller Bearing Company v. United States*, 341 U.S. 593, 974-975 (1951); *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 465-469 (1941). Because of the pernicious affect of such conduct on competition, acts constituting horizontal market allocations or concerted refusals to deal are conclusively presumed to be unreasonable, and, therefore, illegal, without elaborate inquiry as to the precise harm they have caused or the business justifications for their use. *Northern Pacific Railway*, 356 U.S. at 5. Courts faced with such conduct, therefore, need not hear any justification for the reasonableness of the methods pursued by those engaging in such activity. *Fashion Originators Guild*, 312 U.S. at 468.

These time-tested rules are designed to avoid extensive inquiry into the reasonableness of a challenged business practice, allow for certainty in business operations and for litigation efficiency, and apply in spite of the fact that those pursuing such conduct might be able to prove to a finder of fact that their conduct was in fact reasonable. *United States v. Topco Associates*, 405 U.S. at 609; *Continental*

TV, Inc. v. GTE-Sylvania, Inc., 433 U.S. 36, 50, n. 16 (1977).

Recently this Court held that the *per se* principles applicable to commerce generally also had specific application to the health care industry. In *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982), this Court specifically held that *per se* rules need not be rejustified for the health care industry, and any attempt to do so would indicate a "misunderstanding of the *per se* concept." 102 S.Ct. at 2477. *See also United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 224, n. 59 (1940).

When the Fourth Circuit's decision is read in the context of the foregoing standards as enunciated by this Court, it is clear that the Fourth Circuit's decision is unprecedented as a matter of law, unwarranted as a matter of policy and must be reviewed and reversed by this Court.

1. The Fourth Circuit's Decision Is Unprecedented as a Matter of Law.

The Fourth Circuit failed to cite any applicable precedent for its holding, and research discloses that there has not been a single decision by this Court, or any Court of Appeals, applying a "special rule of reason" to proven horizontal market allocation schemes and concerted refusals to deal. The Fourth Circuit did, however, making a passing reference to *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-361 (1963) and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 393, n. 18 (1981). 691 F.2d at 685-686.

In *Silver*, this Court was called upon to determine whether the Securities Exchange Act of 1934 impliedly repealed the antitrust laws as a result of a "plain repugnancy" between the regulatory scheme contemplated by the Securities Exchange Act and the antitrust laws. If a "plain repugnancy"

existed, the antitrust laws would have been limited to the extent necessary to make the regulatory scheme work. *Silver*, 373 U.S. at 357.

In *Silver*, the Court found that although Congress had *mandated* action by the Securities Exchange Commission, the particular action under review (withdrawal of private wire connections between broker dealers and Exchange members) was not within the scope of the Congressional mandate and, therefore, was subject to antitrust review. The *Silver* decision did not discuss any limitation of *per se* rules and cannot serve as precedent, in any fashion, for the Fourth Circuit's decision herein.

The Fourth Circuit's reference to *National Gerimedical Hospital and Gerontology Center* is similarly unsupportive. In *National Gerimedical*, this Court reviewed health planning activities which were, as the actions under review herein, neither compelled nor approved by any governmental regulatory body. This Court characterized the challenged activities in *National Gerimedical* as "a spontaneous response" to the finding of an advisory planning body that there was a "surplus" of acute care hospital beds in the area. This Court held, in spite of Respondents' reliance on specific federal planning legislation (as opposed to general planning legislation at issue herein), which legislation specifically stated that planning was necessary "in order to eliminate unnecessary duplication of hospital services," 42 U.S.C. § 300*l*-2(a)(4), that there was no implied repeal of the antitrust laws with respect to such conduct. 452 U.S. at 391. This Court concluded that "although respondents may well have acted here with only the highest of motives in seeking to implement the plans of the local [planning agency], they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act . . ." 452 U.S. at 393.

Footnote 18 to the decision, cited by the Fourth Circuit, states:

> "Nevertheless, because Congress has remained convinced that competition does not operate effectively in some parts of the health care industry . . . we emphasis that our holding does not foreclose future claims of antitrust *immunity* in other factual contexts." (Emphasis added).

452 U.S. at 393, n. 18. The footnote also made reference to comments of the United States as *amicus curiae* that certain activities must, by implication, be immune from antitrust attack ". . . if HSAs and state agencies are to exercise their authorized powers."

In this case, Respondents made no showing that their "planning" activities were mandated by any particular statute, the result of specific cooperation with a Health Systems Agency in carrying out the Health Systems Agency's own statutory responsibilities, or that their activities were supervised in any way by any federal or state agency. Accordingly, *National Gerimedical* footnote 18 cannot be read to support a holding limiting application of established *per se* rules to voluntary, unsupervised conduct, proven to be a part of a horizontal market allocation conspiracy and a concerted refusal to deal. To do so would in essence reverse this Court's decision in *National Gerimedical* and sanction conduct this Court has already found is not protected from antitrust liability.

In summary, the Fourth Circuit's decision represents a major alteration of established precedents with respect to *per se* rules, including the specific application of those rules to the health care industry. Accordingly, this Court should review the decision of the Fourth Circuit.

2. The Fourth Circuit's Decision Is Unwarranted as a Matter of Policy.

The effect of the Fourth Circuit's decision is to allow courts to hold that actions constituting *per se* violations of the antitrust laws, ostensibly based upon Congressional "encouragement," may be justified if their "intended affects" lay within those a court believes Congress "envisioned" in spite of the fact that the "statutes relied upon" may not be "altogether clear." 691 F.2d at 685-686. Such a holding would create precisely the type of complex litigation that the *per se* rules were designed to avoid. It will require and permit federal courts throughout the country to divine, individually, what Congress may have envisioned in a large variety of statutes, prefaced by general policy goals such as a desire to "reduce costs." It will allow a jury to determine whether compliance with that "envisionment" was reasonable in light of the "needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the 'planners,' either objectively or subjectively assessed." Cf. 691 F.2d at 686. It is this type of litigation of alleged *per se* violations which this Court has consistently rejected. *E.g., Fashion Originators Guild, supra* (rejecting a defense to *per se* liability on the grounds that the acts were reasonable and necessary to protect the "manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four."); *Klors, Inc., supra* (rejecting a defense to *per se* liability that the conduct was necessary in order to allow market entry); *Timken Roller Bearing Company v. United States*, 341 U.S. at 599 (rejecting a defense that the practice was necessary in view of current foreign trade conditions).

As this Court has previously noted with respect to *per se* violations, what may be reasonable conduct today, may, through economic and business changes, become unreasonable tomorrow. Once established, however, the market conditions resulting from unchecked anticompetitive conduct may continue unchanged because of the absence of the competitive influence. Cf. *United States v. Trenton Potteries Company*, 273 U.S. 392, 397 (1927); *White Motor Company v. United States*, 372 U.S. 253, 265, n. 2 (1963); (Brennan, J. concurring). If Respondents are able to convince a jury that their actions were prompted by a desire to avoid a "duplication of resources," Respondents will have been successful in diminishing the number of hospitals in the market area, limiting the freedom of physicians and patients to select the hospitals they most desire to use, limiting the market available to suppliers and, more importantly, eliminating a direct competitor now and for the future.

Finally, this Court has repeatedly held that arguments against application of *per se* rules are to be directed not to the courts, but to Congress. Only Congress can decree *per se* rules inapplicable in some or all situations. *United States v. Topco*, 405 U.S. at 609, n. 10. Recently this Court reaffirmed this holding by noting that any limitation of *per se* rules in the health care industry in particular was for Congress, not the judiciary. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. at 2479.

C. The Fourth Circuit's Decision Regarding Specific Intent in Section 2 Claims Is Inconsistent With Established Antitrust Standards.

Petitioner was able to prove at trial both an attempt to monopolize and a conspiracy to monopolize, violations of Section 2 of the Sherman Act. In spite of the jury's findings,

the Fourth Circuit held that a "defense" existed to these monopoly claims, which it characterized as "analogous" to a "legitimate business purpose" defense. 691 F.2d at 690. The Fourth Circuit's holding regarding proven Section 2 violations, however, is inconsistent with established antitrust standards in that legitimate business purpose is not a "defense" to a Section 2 violation, and, assuming such a defense did exist, an intent to avoid "needless" duplication would neither satisfy its requirements, nor be consistent with the policies embodied in the antitrust laws.

1. Legitimate Business Purpose Is Not a "Defense" to Section 2 Offenses.

Specific intent to monopolize is an element in both attempt to monopolize and conspiracy to monopolize offenses. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Columbia Steel Co.*, 334 U.S. 495, *rehearing denied*, 334 U.S. 862 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Swift & Co. v. United States*, 196 U.S. 375 (1905). The Fourth Circuit, however, labeled the purported existence of a legitimate business purpose as a "defense" to Section 2 claims. Referring to *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) and *American Football League v. National Football League*, 205 F.Supp. 60 (D.Md. 1962) *aff'd.* 323 F.2d 124 (4th Cir. 1963), the Fourth Circuit said: "Proof that the transactions in question were primarily motivated by legitimate business purposes rather than by specific intent to monopolize is a defense to both attempt to monopolize and conspiracy to monopolize." 691 F.2d at 690.

The decisions cited by the Fourth Circuit do not construe legitimate business purposes to be a "defense" to alleged

Section 2 claims. In *Times-Picayune*, 345 U.S. at 627, this Court said that the evidence supported the District Court's determination that the defendants' activities were "predominantly motivated by legitimate business aims," and thus the record did not support the requisite specific intent to sustain an alleged attempt to monopolize. Similarly, in *American Football League*, there was no articulation of a legitimate business purpose "defense".

In spite of this lack of precedential support, the Fourth Circuit espouses the existence of such a defense to proven Section 2 attempt to monopolize and conspiracy to monopolize claims. This Court should grant certiorari to consider the issue of whether a legitimate business purpose is a "defense" to a finding of defendant's specific intent to monopolize, or whether a legitimate business purpose is merely evidence to refute a plaintiff's attempt to prove the requisite specific intent.

2. Intent to Avoid "Needless" Duplication Is Neither a "Legitimate Business Purpose" Nor Consistent With the Policies of the Antitrust Laws.

If a legitimate business purpose "defense" exists, it would, of necessity, require proof that the acts of Respondents were unilaterally undertaken in their own best interests to compete in the relevant health care market.[2] The Fourth Circuit, however, would not require that proof, but would instead require a jury to reject allegations of Section 2 violations by finding, as a matter of fact, that, in spite of a specific intent to monopolize, Respondents were acting out

---

[2]The Fourth Circuit seemingly concedes that application of a legitimate business purpose standard to Respondents' conduct would not rehabilitate that conduct. In this regard the Fourth Circuit states, "[a] literal application of the legitimate business purpose defense . . . does not readily lend itself to application" to health care planners. 691 F.2d at 690.

of a motivation to avoid a "needless duplication" of health care resources. This "needless" duplication would be "gauged by the fact finder in relation to the health care needs of the consumer public in the market area at the time in question." 691 F.2d at 686. The Fourth Circuit standard, therefore, requires consideration of the entire market *and* those elements within it which are "needless." Such a standard finds no support in the case law.

The Fourth Circuit standard means that a jury would, in effect, determine what was, or was not, "needless duplication." In this context, the would-be competitor seeking to enter the market, or an existing competitor (such as Petitioner herein) desiring to expand its productive capacity, would always be the competitor potentially constituting the "needless duplication." The Fourth Circuit standard, therefore, in addition to creating a vehicle limiting, rather than promoting, competition, contains an inherent bias in favor of those already in the market at the expense of a new or expanding competitor. Such a bias is also unsupported by any decision of this Court.

Finally, the effect of the Fourth Circuit's holding with respect to Petitioner's Section 2 claims, therefore, is to delegate to the courts, rather than the marketplace, a determination as to who should or should not be in the market, and who will be allowed to successfully compete in that market. This approach is antithetical to the premise of the antitrust laws that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . ." *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 4-5 (1958).

The fact that the challenged actions take place in the context of "health planning" does not mandate a different conclusion. Indeed, this Court has already determined that

the competitive mandates of the antitrust laws are not suspended in the context of "health planning." *Arizona v. Maricopa County Medical Society, supra*, and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, supra*. Moreover, to the extent that Congress has specifically mandated health planning to governmental action or supervision of otherwise private conduct (*see National Gerimedical, supra*, Note 18) that type of governmental involvement is not at issue herein.

IV. CONCLUSION

Health care competitors are, by virtue of this Court's recent rulings, increasingly cognizant of the antitrust implications and significance of their marketplace activities. The decision of the Fourth Circuit should be reviewed because the decision is inconsistent with the prior rulings of this Court and is contrary to accepted antitrust principles. If not reviewed by this Court, the Circuit Court's decision will have the undesirable effects of creating confusion, uncertainty and increased antitrust litigation in the health care industry. Because of the importance of the health care industry to both the nation's economy and its citizens' welfare, this Court should grant certiorari to review the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

CARL WEISSBURG
(Counsel of Record)
J. MARK WAXMAN
WEISSBURG AND ARONSON, INC.
Attorneys for Amicus Curiae Federation of American Hospitals.

Of Counsel:
ROBERT J. ENDERS
WEISSBURG AND ARONSON, INC.

[THIS PAGE INTENTIONALLY LEFT BLANK]

[THIS PAGE INTENTIONALLY LEFT BLANK]